Carsem (M) Sdn Bhd v Fatimah bt Noordin

HIGH COURT (IPOH) — CIVIL APPEAL NO AA-12ANCVC-2–01 OF 2021
SU TIANG JOO JC
11 OCTOBER 2021

Civil Procedure — Jurisdiction — Registrar — Jurisdiction of senior assistant registrar — Whether senior assistant registrar had jurisdiction and power to make order which had the effect of disposing with finality an appeal from subordinate court to judge in chambers of High Court — Whether 'judge in chamber' included senior assistant registrar — Courts of Judicature Act 1964 ss 3, 10(3) & 18(1) — Rules of Court 2012 O 1 r 4, O 32 r 9, O 34 r 1 & O 55 r 5(1) — Subordinate Courts Act 1948 (Revised 1972)

The appellant's application at the sessions court for discovery and inspection of documents was dismissed by the learned sessions court judge ('the SCJ'). The appellant then filed an appeal ('Appeal No 2') against the said decision and in opposing the appeal, the respondent filed an application ('encl 8') to struck out the appeal on the ground that the notice of appeal and the record of appeal had been filed out of time. Meanwhile, the appellant's application at the sessions court for extension of time to file and serve the notice of appeal was dismissed by the SCJ. In view of this decision, during a case management session via e-Review on 25 March 2021, the learned senior assistant registrar ('the SAR') had dismissed Appeal No 2 and held that encl 8 had been rendered academic ('the SAR's order'). The appellant was dissatisfied with SAR's order and applied for the matter to be referred to the learned judge. The issues arose were: (a) whether the learned SAR had the jurisdiction and power to make an order which had the effect of disposing with finality an appeal from the subordinate court to a judge in chambers of the High Court; and (b) whether a 'judge in chamber' included a senior assistant registrar.

Held, setting aside the SAR's order:

(1) With there being a specific provision in O 55 of the Rules of Court 2012 ('the ROC') on appeals to High Court from subordinate courts and in particular, O 55 r 5(1) of the ROC, there could not be any resort to the general provisions in O 32 and O 34 of the ROC. If there was a conflict between the specific provisions of O 55 r 5(1) and the general provisions in O 32 and O 34 of the ROC , the rule of statutory provision, *generalibus specialia derogant* would apply to give effect to a specific provision in preference to a general provision. In Appeal No 2, the court was dealing

with an appeal from the subordinate court to the High Court which ought to be disposed of by a judge in chambers under O 55 r 5(1) of the ROC (see paras 32–34). A

(2) Taking the respondent's position that judge in chambers for purposes of O 55 r 5(1) of the ROC included a registrar would result in absurdity. The absurdity being that an appeal from the subordinate court to a judge in chambers could be heard by a registrar and whose decision could be further appealed to another judge in chambers who by the respondent's contention would also include a registrar. In respect of the power granted to the registrar under O 32 r 9 of the ROC , the provisions of O 55 r 5(1) of the ROC expressly direct that an appeal from any decision other than a decision made after trial by the subordinate court shall be transacted and exercised by a judge in person (see paras 35–36). B C

(3) Based on ss 3 and 18(1) of the Courts of Judicature Act 1964 ('the CJA'), a registrar was not included in the definition of a judge. Instead, there was a separate provision altogether for the registrar making it clear that the office of that of a judge and a registrar was separate with the provision for the latter's office coming under s 10(3) of the CJA (see paras 37–38). D

(4) It could be readily seen that under the definition for 'Registrar' in O 1 r 4 of the ROC, it did not provide that it meant a judge, as the case may require. Applying the principle that the greater included the lesser, it could be easily understood that a judge would mean a registrar as the case may require but the converse did not hold true. Further, the underlying jurisprudence of the hierarchy of the judicial system provided in the Subordinate Courts Act 1948 (Revised 1972) and the CJA was such that a matter under appeal would be disposed by a higher tier which was normally presided by a more senior judicial officer than the tier subordinate to it. It would not be in accord with such jurisprudence for the learned SAR to sit in appeal over the decision of a more senior judicial officer which in this case was the SCJ. Even if the registrar included a judge for purposes of O 55 r 5(1) of the ROC, there was no earlier direction under O 34 r 1 of the ROC given during the e-Review as to attract a striking out order to be made as of 25 March 2021 (see paras 29 & 43). E F G H

(5) Based on the facts, the court was of the opinion that the learned SAR had merely articulated her thoughts on 25 March 2021 that with the appellant having failed to secure an extension of time in the sessions court, to her mind Appeal No 2 would logically fail and be struck out without meaning to make an order which she had no power to make, more so, when the occasion was only that of an e-Review of the appeal rather than for the disposal of the appeal with an application for striking out still extant. The learned SAR had then to her credit referred the matter to the judge for clarification which led to the judge's decision in I

the present action, and which is now under appeal by the respondent. If the expression of thought by the learned SAR made on 25 March 2021 had crystallised into a decision as alleged by the respondent, the same was a nullity (see paras 44 & 47).

(6) In conclusion, the learned SAR did not have the power to make any order that would have the effect of disposing with finality an appeal from the subordinate court to the High Court which was to be determined by a judge in person and not a registrar. As such, the learned SAR could not have made the alleged order of 25 March 2021 and even if she had done so, the same was a nullity and of no legal effect and for good order was set aside or deemed to be set aside (see para 49).

[Bahasa Malaysia summary

Permohonan perayu di mahkamah sesyen untuk penzahiran dan pemeriksaan dokumen telah ditolak oleh hakim mahkamah sesyen yang bijaksana ('HMS'). Perayu kemudiannya memfailkan rayuan ('Rayuan No 2') terhadap keputusan tersebut dan dalam menentang rayuan tersebut, responden memfailkan permohonan ('lampiran 8') untuk membatalkan rayuan atas alasan bahawa notis rayuan dan rekod rayuan telah difailkan di luar masa. Sementara itu, permohonan perayu di mahkamah sesyen untuk lanjutan masa untuk memfailkan dan menyampaikan notis rayuan telah ditolak oleh HMS. Mengambilkira keputusan ini, semasa sesi pengurusan kes melalui e-Review pada 25 Mac 2021, penolong kanan pendaftar yang bijaksana ('SAR') telah menolak Rayuan No 2 dan memutuskan bahawa lampiran 8 telah menjadi akademik ('perintah SAR'). Perayu tidak berpuas hati dengan perintah SAR dan memohon agar perkara tersebut dirujuk kepada hakim yang arif. Isu-isu yang timbul ialah: (a) sama ada SAR yang bijaksana mempunyai bidang kuasa dan kuasa untuk membuat perintah yang mempunyai kesan untuk melupuskan dengan muktamad rayuan daripada mahkamah rendah kepada hakim dalam kamar Mahkamah Tinggi; dan (b) sama ada 'hakim dalam kamar' termasuk penolong kanan pendaftar.

Diputuskan, mengenepikan perintah SAR:

(1) Dengan adanya peruntukan khusus iaitu A 55 Kaedah-Kaedah Mahkamah 2012 ('KKM') mengenai rayuan kepada Mahkamah Tinggi daripada mahkamah rendah dan khususnya, A 55 k 5(1) KKM, tidak ada apa-apa tindakan yang boleh diambil melalui peruntukan am iaitu A 32 dan A 34 KKM. Jika terdapat percanggahan antara peruntukan khusus A 55 k 5(1) KKM dan peruntukan am dalam A 32 dan A 34 KKM, peraturan peruntukan berkanun, *generalibus specialia derogant* akan terpakai untuk memberi kesan kepada peruntukan khusus yang akan menjadi keutamaan melebihi peruntukan am. Dalam Rayuan No 2, mahkamah berhadapan dengan rayuan daripada mahkamah rendah kepada Mahkamah Tinggi yang sepatutnya diputuskan oleh hakim

dalam kamar di bawah A 55 k 5(1) KKM (lihat perenggan 32–34). A

(2) Mengambil pendirian responden bahawa hakim dalam kamar bagi tujuan A 55 k 5(1) KKM adalah termasuk pendaftar akan mengakibatkan sesuatu yang tidak masuk akal. Tidak masuk akal kerana rayuan daripada mahkamah rendah kepada hakim dalam kamar boleh didengar oleh pendaftar dan keputusannya boleh dirayu lagi kepada hakim lain dalam kamar yang mana berdasarkan hujahan responden juga termasuk pendaftar. Berkenaan dengan kuasa yang diberikan kepada pendaftar di bawah A 32 k 9 KKM, peruntukan A 55 k 5(1) KKM dengan jelas mengarahkan supaya rayuan daripada apa-apa keputusan selain keputusan yang dibuat selepas perbicaraan oleh mahkamaf rendah hendaklah dijalankan dan dilaksanakan oleh hakim sendiri (lihat perenggan 35–36). B C

(3) Berdasarkan ss 3 dan 18(1) Akta Mahkamah Kehakiman 1964 ('AMK'), seorang pendaftar tidak termasuk dalam definisi hakim. Sebaliknya, terdapat peruntukan yang berasingan sama sekali untuk pendaftar yang menjelaskan bahawa jawatan hakim dan pendaftar adalah berasingan dengan peruntukan bagi jawatan pendaftar termaktub di bawah s 10(3) AMK (lihat perenggan 37–38). D E

(4) Dapat dilihat dengan mudah bahawa di bawah definisi untuk 'Pendaftar' dalam A 1 k 4 KKM, ia tidak memperuntukkan bahawa ia bermaksud hakim, mengikut kehendak keadaan. Menggunakan prinsip bahawa yang lebih besar termasuk yang lebih kecil, boleh difahami dengan mudah bahawa hakim bermaksud pendaftar mengikut kehendak keadaan tetapi sebaliknya tidak berlaku. Selanjutnya, perundangan asas hierarki sistem kehakiman yang diperuntukkan dalam Akta Mahkamah Rendah 1948 (Disemak 1972) dan AMK adalah bahawa perkara di bawah rayuan akan diselesaikan oleh peringkat yang lebih tinggi yang biasanya dibicarakan oleh pegawai kehakiman yang lebih kanan daripada peringkat bawahannya. Ia akan bercanggah dengan perundangan sedemikian jika SAR yang bijaksana bersidang dalam rayuan terhadap keputusan pegawai kehakiman yang lebih kanan yang mana dalam kes ini adalah HMS. Andai kata pendaftar adalah hakim bagi tujuan A 55 k 5(1) KKM, tidak ada arahan awal di bawah A 34 k 1 KKM yang diberikan semasa e-Review yang membolehkan perintah pembatalan dibuat setakat 25 Mac 2021 (lihat perenggan 29 & 43). F G H

(5) Berdasarkan fakta-fakta, mahkamah berpendapat bahawa SAR yang bijaksana hanyalah menyatakan fikirannya pada 25 Mac 2021 bahawa dengan perayu gagal mendapatkan lanjutan masa di mahkamah sesyen, pada fikirannya Rayuan No 2 akan secara logiknya gagal dan dibatalkan tanpa bermaksud untuk membuat perintah yang dia tidak mempunyai kuasa untuk membuat, lebih-lebih lagi, apabila keadaan tersebut hanyalah e-Review untuk rayuan dan bukannya untuk pelupusan rayuan I

dengan permohonan untuk pembatalan masih wujud. Penolong kanan pendaftar yang bijaksana kemudiannya merujuk perkara tersebut kepada hakim untuk penjelasan yang membawa kepada keputusan hakim dalam tindakan semasa, dan yang kini dalam rayuan oleh responden. Sekiranya ungkapan pemikiran oleh SAR yang bijaksana yang dibuat pada 25 Mac 2021 telah menjadi keputusan seperti yang didakwa oleh responden, keputusan tersebut adalah terbatal (lihat perenggan 44 & 47).

(6) Kesimpulannya, SAR yang bijaksana tidak mempunyai kuasa untuk membuat apa-apa perintah yang akan mempunyai kesan untuk melupuskan dengan muktamad rayuan daripada mahkamah rendah kepada Mahkamah Tinggi yang akan ditentukan oleh hakim sendiri dan bukan pendaftar. Oleh itu, SAR yang bijaksana tidak boleh membuat perintah bertarikh 25 Mac 2021 seperti yang didakwa dan walaupun dia telah berbuat demikian, perintah tersebut adalah terbatal dan tidak mempunyai kesan undang-undang dan untuk perintah yang baik diketepikan atau dianggap diketepikan (lihat perenggan 49).]

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors [2002] 6 MLJ 619; [2002] 4 CLJ 694, HC (refd)

Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (folld)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)

Muraly a/l Subramaniam v PP [2021] MLJU 939; [2021] 7 CLJ 794, HC (refd)

PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ 354; [1982] CLJ Rep, FC (refd)

Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 at 181; [1988] 1 CLJ 31, CA (refd)

RHB Bank Bhd v Puyang Laing (F) [2017] 2 MLJ 63, CA (refd)

Setali Development Sdn Bhd v Lim You Leng [1984] 1 MLJ 26, FC (refd)

Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461, FC (distd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 10(3), 18(1)

Rules of Court 2012 O 1 r 4, O 1 r 4(2), O 24 rr 3, 7, O 32, O 32 r 9, O 34, O 34 rr 1, 1(1), 1(3), O 34 r 2, O 55, O 55 r 5(1), O 56 r 1, O 92 r 3B

Rules of the High Court 1980 O 92 r 4

Subordinate Courts Act 1948

Hoi Jack S'ng (Nicola Tang with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Raam Kumar (Norleena bt Jamal with him) (KB Tan Kumar & Partners) for the respondent.

Su Tiang Joo JC:

INTRODUCTION

[1] The court was tasked with the query as to whether the learned senior assistant registrar has the jurisdiction and power to make an order which has the effect of disposing with finality an appeal from the subordinate court to a judge in chambers of the High Court.

[2] The appellant was the plaintiff and the respondent the defendant in the court below and the parties shall be referred to as they were in the subordinate court, which in this case, is the sessions court.

CHRONOLOGY OF SALIENT EVENTS

[3] On 18 December 2020 the learned sessions court judge ('LSJ') dismissed with costs ('sessions court order of 18 December 2020') the plaintiff's application for discovery and inspection of documents under O 24 r 3 and or r 7 Rules of Court 2012 ('the ROC 2012').

[4] Dissatisfied, by notice of appeal dated 13 January 2021 (encl 1) the plaintiff appealed to the High Court.

[5] The plaintiff's record of appeal (encls 3–6) was filed on 10 February 2021.

[6] On 24 March 2021, the defendant filed an application (encl 8) to have the appeal struck out on the ground that the notice of appeal (encl 1) and the record of appeal have been filed out of time.

[7] We now come to the critical event which forms the crux of the decision under appeal. On 25 March 2021, a case management was conducted by way of e-Review before the learned senior assistant registrar ('SAR'). The court's minutes of this event is set out in extenso hereunder so as to better appreciate what took place:

Tarikh: 25 Mac 2021

Peguam Responden 1: Selamat pagi dan dengan izin Puan Norleena peguamcara bagi Responden. Pihak Responden telah menfailkan Notis Permohonan berserta Afidavit Sokongan untuk membatalkan rayuan Perayu pada 24.03.2021. Salinan dokumen tersebut juga telah diserahkan kepada peguamcara Perayu semalam secara emel dan akan dikurier pada hari ini. Untuk makluman Mahkamah saya mempunyai perbicaraan di Mahkamah Rayuan secara dalam talian. Pohon tangguh sebentar, jika perlu dan sekiranya terdapat apa-apa isu untuk ditangani.

Peguam Perayu 1: Selamat pagi Puan, Nicola Tang bagi pihak Perayu.

Peguam Perayu 1: *Pihak kami ingin memaklumkan Mahkamah yang Mulia ini bahawa pada 24.3.2021, Tuan Hakim Mahkamah Sesyen telah menolak permohonan kami untuk lanjutan masa bagi memfailkan dan menyampaikan Notis Rayuan ini*.

Mahkamah: *Mahkamah ambil maklum akan keputusan tersebut, Lanjutan daripada keputusan tersebut, Rayuan ini dibatalkan. Oleh yang demikian, mahkamah berpendapat permohonan Responden di Lampiran 8 iaitu untuk membatalkan Rayuan ini telah menjadi akademik*.

Peguam Responden 1: Kami ambil maklum perintah Mahkamah di atas. Namun begitu pihak Responden memohon kos daripada Perayu sebanyak RM10,000.

Peguam Responden 1: Atas alasan meskipun Perayu masih belum mendapatkan kebenaran untuk memfailkan notis rayuan di luar masa, Perayu telah memfailkan Notis Rayuan berserta Rekod rayuan yang mana tanpa prejudis kepada hak Responden, kami telah meneliti, meminda, dan meminta Perayu mengemukakan sekali lagi deraf indeks rekod rayuan kerana tidak mematuhi standard indeks rekod rayuan yang dipraktikkan oleh peguam.

Peguam Responden 1: Lanjutan daripada itu kami juga telah memfailkan permohonan untuk membatalkan rayuan Perayu. Oleh itu saya pohon kos sebanyak RM10,000 Puan.

Peguam Perayu 1: *Pihak kami mengambil maklum perintah Mahkamah*.

Peguam Perayu 1: *Untuk makluman Puan, pihak kami sedang mengambil arahan daripada pelanggan untuk memfailkan rayuan bagi keputusan bertarikh 24.3.2021*.

Peguam Perayu 1: Puan, Defendan telah memfailkan permohonan tersebut selepas Mahkamah Sesyen telah memberi keputusan supaya menolak permohonan Plaintif untuk lanjutan masa.

Peguam Perayu 1: Berkenaan dengan dakwaan bahawa pihak kami tidak mengikut standard praktis, itu adalah tidak benar. Standard praktis yang dirujuk oleh Defendan adalah Practice Directions for the Court of Appeal.

Peguam Perayu 1: With respect Puan, Costs of RM10,000 is not reasonable. We have also been ordered to pay costs of RM3,000 in the Sessions Court for the dismissal of our application for extension.

Peguam Perayu 1: In any event, the Appellant is entitled to file the Notice of appeal before the notice of application is filed.

Peguam Perayu 1: With respect Puan, the Respondent had only commented on the draft Index which consisted of 3 pages. In fact, we had prepared the Record of Appeal based on the Respondent' wishes, which as we mentioned, was based on the

Practice Direction of Court of Appeal which are not relevant to the proceedings here. As such, it is our side who has incurred costs on the preparation of the Records.

Peguam Perayu 1: *Puan, memandangkan pihak kami akan memfailkan notis rayuan terhadap keputusan Mahkamah Sesyen, rayuan ini tidak patut dibatalkan. Dalam hal ini, pihak kami baru mendapat arahan anak guam kami*.

Peguam Perayu 1: Dalam apa jua keadaan, memandangkan Responden telah memfailkan permohonan mereka untuk membatalkan Rayuan ini, pihak kami mempunyai hak untuk membalas terhadap afidavit sokongan Responden tersebut.

Peguam Responden 1: *With respect to my learned friend, this Honourable Court had made a decision and/or Order that this appeal is dismissed and enclosure 8 is academic. And this honourable court had taken cognisance of the lower courts' decision. And again, with respect, it is improper for my learned friend to insist this Honourable Court to hear this appeal when the court already made a decision and/or Order*. On the issue of costs, I humbly pray so.

Peguam Responden 1: In short, we abide by the court's decision.

Peguam Perayu 1: *Puan with respect, the matter is not fixed for disposal today, it is only fixed for case management. Peguam Perayu 1 : Furthermore, The Respondent has also filed a notice of application in this Court to strike out the appeal, as such, we should be given the opportunity to respond to the affidavit*.

Peguam Perayu 1: *More importantly, given that we have received our client's instructions to appeal against the Sessions Court decision, this matter ought to be heard by the Judge, and should not be struck out today*.

Peguam Perayu 1: May I just add Puan, the application that the respondent has filed in on 24.3.2021, directions were previously given for any applications to be made by 19.3.2021. That was not complied with and we have informed the court of this during our last CM on 22.3.2021.

Peguam Perayu 1: *Puan, given that today is only fixed for case management, we humbly ask for a date before the Judge. This appeal ought to still stand based on the above mentioned matters*.

Peguam Responden 1: *Puan, I stand to be corrected, but if my learned friend is dissatisfied with the Court's decision today, she may file an appeal to the court of appeal. With respect, this Honourable cannot withdraw the decision and/or order that has been pronounced*.

Peguam Perayu 1: *Just to update Puan, we have filed our notice of appeal against the Sessions Court's dismissal of our application to extend time to file and service this notice of appeal. As mentioned, we humbly request for this matter to be fixed before the learned Judge so that the issues can be ventilated before this Honourable Court*.

[8] Thereafter, the learned counsel for the plaintiff, Ms Nicola Tang, followed up with the learned SAR on 26 March 2021 and the minutes of the communication is set out hereunder:

Tarikh: 26 Mac 2021

Peguam Perayu 1: Selamat sejahtera Puan, pihak kami ingin tanya sama ada sebarang pengemaskinian tentang pemohonan kami supaya perkara ini dirujuk

kepada Yang Arif Hakim untuk tindakan selanjutnya. Seperti yang dimaklumkan pada hari semalam (25.3.2021), perkara ini hanya ditetapkan untuk CM pada hari semalam. Oleh itu dengan rendah dirinya, rayuan ini tidak harus dan tidak boleh dibatalkan. Pihak kami memohon untuk arahan selanjutnya daripada Puan untuk perkara ini. Sekian, terima kasih.

[9] The learned SAR then referred the matter to me and the minutes of the court's records of the communication by the learned SAR to the solicitors for the parties show as follows:

Tarikh: 29 Mac 2021

Mahkamah: Saya telah merujuk kepada Yang Arif akan perkara ini dan Yang Arif mengarahkan untuk satu pengurusan kes ditetapkan di hadapan beliau Mahkamah Mahkamah menetapkan 16.4.2021 sebagai Pengurusan Kes di hadapan YA Tuan Su Tiang Joo.

Peguam Perayu 1: Selamat sejahtera Puan Hafiza, pihak kami mengambil maklum tentang arahan Mahkamah yang Mulia ini.

Peguam Perayu 1: Pihak kami ingin tanya sama ada pengurusan kes tersebut adalah secara fizikal ataupun atas talian Zoom/Skype?

Mahkamah: secara fizikal @ kehadiran peguam di mahkamah. System: Next Schedule: A-Track — 16 Apr 2021 09:00 AM (YA Tuan Su Tiang Joo)

[10] On 16 April 2021 after hearing parties, I posed the query as to whether the learned SAR has the power to strike out the appeal which learned counsel for the defendant submits had been ordered by the learned SAR on 25 March 2021. The matter was then adjourned to 8 June 2021 for this issue to be argued but this date was subsequently vacated and rescheduled to 2 August 2021 by reason of the Movement Control Order restricting travel and operations by reason of the COVID-19 pandemic.

[11] After hearing parties on 2 August 2021, I reserved my decision to 6 September 2021.

[12] On 6 September 2021, I gave a brief decision that the learned SAR does not have the power to make any order that would have the effect of disposing with finality an appeal from the subordinate court to the High Court which is to be determined by a judge in chambers and that the learned SAR could not have made such an order on 25 March 2021 and even if she had, the order is a nullity and of no legal effect and for good order is set aside or deemed to be set aside.

[13] On the 6 September 2021, the appeal by the plaintiff against the order of the sessions court of 24 March 2021 dismissing the plaintiff's application for extension of time to file the notice of appeal was also before me for case

management. This other appeal carries the title AA-12NCvC-16–03 of 2021 ('Appeal No 16') which had, upon the application of the plaintiff, been ordered by Abdul Wahab bin Mohamed J on 26 August 2021 to be transferred to this court to be heard together with this action. To avoid any confusion, the appeal in this action shall hereafter be referred to as Appeal No 2.

[14] Seeing that the issue in the application to strike out (encl 8) in this Appeal No 2 is intertwined with Appeal No 16 which is whether the plaintiff's Appeal No 2 should be struck out by reason of the appeal being filed out of time or whether Appeal No 16 ought to be allowed so as to give the plaintiff an extension of time to regularise its appeal, I had on 6 September 2021 directed that both encl 8 and Appeal No 16 were to be heard together on 10 November 2021.

[15] Dissatisfied with the decision I have made on 6 September 2021, the plaintiff now appeals to the Court of Appeal.

ISSUE

[16] Order 55 r 5(1) of the ROC 2012 provides that:

> An appeal from any decision other than a decision made after trial by the Subordinate Court shall lie to a Judge in Chambers of the High Court.

[17] There is no dispute and in fact indisputable that the sessions court order of 18 December 2020 under appeal in Appeal No 2 is a decision other than a decision made after trial by a subordinate court.

[18] As an appeal shall lie to a judge in chambers, the issue thus is whether a 'judge in chambers' includes a senior assistant registrar.

RIVAL CONTENTIONS

[19] The defendant drew the court's attention to the definition of 'Registrars' under sub-s 10(3) of the Courts of Judicature Act 1964 (Revised 1972) Act 91 ('the CJA') as well as the definition of 'Registrar' and 'Judge' under O 1 r 4 ROC 2012.

[20] Thereafter, the defendant went on to draw my attention to:

(a) the jurisdiction of the registrar as provided under O 32 r 9 of the ROC 2012 which for convenience is set out below:

> 9 Jurisdiction of Registrar (O 32 r 9)
>
> The Registrar shall have power to transact all such business and exercise all

such authority and jurisdiction as under the Act or these Rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Judge may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person;

(b) the provisions of power and/or jurisdiction of the 'Court' in 'Pre-Trial Case Management' under O 34 r 2 of the ROC 2012;

(c) the definition of 'Court' under O 1 r 4 (2) of the ROC 2012;

(d) the definition of 'matter' under s 3 of the CJA which includes every proceeding in court not in a cause; and

(e) the definition of 'proceeding' which is defined to mean any proceedings whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

[21] Mr Raam Kumar, the lead counsel for the defendant, cited and also placed reliance upon the Federal Court authority of *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461 where the decision of the deputy registrar to strike out the plaintiff's appeal (see plaintiff's written submissions encl 21 para 31) during case management for the plaintiff's failure to comply with the court's direction was affirmed to advance the point that the registrar does have power to strike out a matter during a case management (encl 21 para 32).

[22] Learned counsel for the defendant asserted that the learned SAR is seized with a wide jurisdiction under O 32 r 9 of the ROC 2012 including that to strike out the plaintiff's appeal. And, he added that this is consistent with O 56 r 1 of the ROC 2012 wherein any judgment, order or decision of the registrar is appealable to the judge (encl 21 para 33). With the plaintiff not having appealed to a judge in chambers, the plaintiff must have taken full acceptance of the learned SAR's order of 25 March 2021 striking out Appeal No 2 and is estopped from contending otherwise with reliance placed on the Court of Appeal's authority of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57.

[23] Mr Raam Kumar concluded with the assertion that in the circumstances, the order of 25 March 2021 is an order of the High Court and it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction with reliance placed on the oft-quoted Federal Court authority of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75.

[24] After making reference to O 55 r 5(1) of the ROC 2012 and making emphasis that the appeal shall lie to a judge in chambers, Mr Hoi Jack S'ng, lead counsel for the plaintiff referred to the Federal Court authority of *Setali Development Sdn Bhd v Lim You Leng* [1984] 1 MLJ 26 at p 28 para C where the words 'in chambers' was construed to mean the judge sitting in private.

[25] Mr Hoi Jack S'ng asserted that O 55 r 5(1) of the ROC 2012 does not confer jurisdiction or power on a Registrar to decide and make dispositive orders in relation to an appeal from a subordinate court.

[26] On the contention by the defendant that the learned SAR has the power to strike out an appeal under O 32 r 9 of the ROC 2012 which for ease of reading and convenience is reproduced below, emphasis was laid by learned counsel for the plaintiff on the words in bold:

> 9 Jurisdiction of Registrar (O 32 r 9)
>
> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these Rules may be transacted and exercised by a Judge in Chambers *except* such business, authority and jurisdiction as the Chief Judge may from time to time direct to be transacted or exercised by a Judge in person *or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person*.

[27] Reference was made to the Court of Appeal authority of *RHB Bank Bhd v Puyang Laing (F)* [2017] 2 MLJ 63 where Rohana Yusof JCA (now PCA) held at p 66 para [7]:

> [7] The power of the registrar, to exercise the authority and jurisdiction of a judge in chamber(s) found in O 32 r 9 is subjected to two provisos namely:
>
> (a) such business, authority and jurisdiction as the Chief Justice (sic) may from time to time direct to be transacted by a judge in person; or
>
> (b) as may by any of these rules be expressly directed to be transacted or exercised by a judge in person.

[28] Learned counsel for the plaintiff concludes that O 55 r 5(1) of the ROC 2012 makes it clear that an appeal from a subordinate court can only be transacted or exercised by a judge in person.

[29] As for the provisions of O 34 of the ROC 2012, learned counsel for the Plaintiff pointed out that the provisions housed therein are not applicable to an appeal under O 55 r 5(1) of the ROC 2012 because read in its entirety the provisions are to do with the giving of directions to ensure the disposal of an action which originates or is brought in the High Court. Further, the learned SAR could not have availed of the provision to strike out under O 34 r 1(3) of the ROC 2012 when there was no direction having been issued under O 34 r

1(1) of the ROC 2012 as to lead to there being a non-compliance in the first place. Indeed, this court found that there was no direction issued for compliance prior to the e-Review on 25 March 2021.

[30] From the minutes of what took place before the learned SAR and which I have set out above, learned counsel for the plaintiff asserts that the learned SAR did not confirm that the appeal was struck out after the plaintiff's counsel submitted at length as to why the appeal should not be struck out, did not consider the defendant's application for costs and had instead referred this matter to me and, therefore, the learned SAR did not strike out the appeal.

[31] With an application to strike out the appeal (encl 8) still extant, learned counsel for the plaintiff submits that to have the appeal struck out at an e-Review where there is an appeal against the sessions court's order dismissing the application for an extension of time on foot would be a decision made in breach of natural justice with reference made to the case of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 at para [188].

ANALYSIS AND FINDINGS

[32] With there being a specific provision in O 55 of the ROC 2012 on Appeals to High Court from Subordinate Courts and in particular, O 55 r 5(1) of the ROC 2012, there cannot be any resort to the general provisions in O 32 and O 34 of the ROC 2012.

[33] If there is a conflict between the specific provisions of O 55 r 5(1) and the general provisions in O 32 and O 34 of the ROC 2012, the rule of statutory provision, *generalibus specialia derogant* would apply to give effect to a specific provision in preference to a general provision. See *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah Bin Abu Samah & Ors* [1988] 1 MLJ 178 at p 181; [1988] 1 CLJ 31 at p 247 where the Supreme Court held that it will not invoke its inherent powers under O 92 r 4 when the rules contain provisions making available sufficient remedies and although this was decided under the Rules of the High Court 1980, the principle will apply with equal force to the Rules of Court 2012. See also *Muraly a/l Subramaniam v Public Prosecutor* [2021] MLJU 939; [2021] 7 CLJ 794 (HC) and *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ 354; [1982] CLJ Rep (FC)

[34] With due respect to learned counsel for the defendant, the facts in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* are easily distinguishable in that the matter did not deal with an appeal from a subordinate court to the High Court. Instead, the deputy registrar struck out the action after there was non-compliance with directions for discovery given under pre-trial case management in an action which originated in the High

Court and the appeal to the judge in chambers was dismissed and instead of appealing to the Court of Appeal, the plaintiff initiated a fresh or second suit which was struck out and the Federal Court in the second suit held that the plaintiff's failure to appeal to the Court of Appeal was fatal. In our case in Appeal No 2, we are dealing with an appeal from the subordinate court to the High Court which ought to be disposed of by a judge in chambers under O 55 r 5(1) of the ROC 2012.

[35] Indeed, taking the defendant's position to its logical conclusion that a judge in chambers for purposes of O 55 r 5(1) of the ROC 2012 includes a registrar would result in absurdity because it would mean the learned registrar's alleged order of 25 March 2021 striking out Appeal No 2 would be subjected to another appeal to yet another judge in chambers under O 56 of the ROC 2012 on appeals from registrars of the High Court to a judge in chambers. The absurdity being that an appeal from the subordinate court to a judge in chambers can be heard by a registrar and whose decision can be further appealed to another judge in chambers who by the defendant's contention would also include a registrar.

[36] On the power granted to the registrar housed within O 32 r 9 of the ROC 2012, I am of the opinion that the provisions of O 55 r 5(1) of the ROC 2012 expressly direct that an appeal from any decision other than a decision made after trial by the subordinate court shall be transacted and exercised by a judge in person. The expression 'in chambers' is only to differentiate it from an appeal from a decision made after trial where the appeal is to be heard by the judge in open court instead of 'in chambers' which means 'in private' as held by *Setali Development*.

[37] The following provisions in ss 18(1) and 3 of the CJA reproduced hereunder, provide reasons in support for the above view:

(a) sub-s 18(1) — 'every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge'; and

(b) s 3 — 'Judge' means a judge of the Federal Court, of the Court of Appeal or of the High Court and includes the Chief Justice, the President and a Chief Judge.

[38] What becomes immediately apparent is that a registrar is not included in the definition of a judge. Instead, there is a separate provision altogether for the registrar making it clear that the office of that of a judge and a registrar is separate with the provision for the latter's office coming under s 10(3) of the CJA which is reproduced below:

A The Chief Registrar, Registrars, Deputy Registrars, Senior Assistant Registrars and Assistant Registrars appointed under this Act shall subject to this Act or any other written law have the same jurisdiction, powers and duties as the Masters of the Supreme Court, Clerks of Criminal Courts, Registrars and like officers in the Supreme Court of Judicature in England and, in addition, such further jurisdiction, B powers and duties as may be prescribed by rules of court.

[39] Save for the rules discussed above, despite the efforts made by counsel which this court appreciates, no provision in England that would confer upon the master, which is equivalent to our registrar, the power to hear and dispose C of appeals from the subordinate courts could be found to assist in this matter.

[40] It was submitted by the defendant (encl 31 para 30–31) that a judge also means a registrar. And references were made to the definitions of that of a registrar and judge under O 1 r 4 of the ROC 2012 which provides that a D 'Judge' means a judge or judicial commissioner of the High Court and includes, where he is empowered to act, a judge of the sessions court, a magistrate or *a registrar, as the case may require*.

E **[41]** Attention was also drawn by learned counsel for the defendant to Practice Direction No 1 Year 2020 (encl 31 para 40–44) issued by the Chief Judge of Malaya pursuant to O 92 r 3B of the ROC 2012 and in particular to paras 6.1 and 9.6 which provides:

F 6.1 Pengurusan kes secara e-review Kali Pertama di Hadapan Pegawai Kehakiman.

9.6 Sekiranya mana-mana pihak gagal mematuhi arahan yang diberikan oleh Hakim atau Pegawai Kehakiman semasa pengurusan kes sama ada secara e-review atau kehadiran di hadapan Mahkamah, Mahkamah bolehlah membuat perintah yang lain yang sebagaimana yang difikirkannya patut termasuklah berkenaan kos atau membatalkan tindakan atau prosiding itu.

G

[42] I understand the defendant as asserting that premised upon the definition of judge under O 1 r 4 of the ROC 2012 and the said Practice Direction No 1 Year 2020, 'Pegawai Kehakiman' which indisputably includes the learned SAR, is equivalent to that of a 'Judge in Chambers' stipulated in H O 55 r 5(1) of the ROC 2012 and the learned SAR would therefore have the power to strike out an appeal from the subordinate court because she would have done so as a judge in chambers.

I **[43]** With respect, I disagree for the further following reasons:

(a) it can be readily seen that under the definition for 'Registrar' in O 1 r 4 ROC 2012, it does not provide that it means a judge, as the case may require. Applying the principle that the greater includes the lesser, it can be easily understood that a judge would mean a registrar as the case may

require but the converse do not hold true;

(b) the underlying jurisprudence of the hierarchy of the judicial system set out in the Subordinate Courts Act 1948 (Revised 1972) and the Courts of Judicature Act 1964 (Revised 1972) is such that a matter under appeal will be disposed by a higher tier which is normally presided by a more senior judicial officer than the tier subordinate to it and with all due respect, it would not be in accord with such jurisprudence for the learned SAR to sit in appeal over the decision of a more senior judicial officer which in this case is a sessions court judge; and

(c) even if the registrar includes a judge for purposes of O 55 r 5(1) of the ROC 2012 for reasons I have already set out, there was no earlier direction given during the e-Review as to attract a striking out order to be made as at 25 March 2021.

[44] From the facts that obtain, I am of the opinion that the learned SAR had merely articulated her thoughts on 25 March 2021 that with the plaintiff having failed to secure an extension of time in the sessions court, to her mind Appeal No 2 would logically fail and be struck out without meaning to make an order which she has no power to make, more so, when the occasion was only that of an e-Review of the appeal rather than for the disposal of the appeal with an application for striking out still extant. The learned SAR had then to her credit referred the matter to me for clarification which led to the decision made on 6 September 2021 and which is now under appeal by the defendant.

[45] The defendant pursued the matter seeking to hold on to there being an order made by the learned SAR on 25 March 2021 and sought for this alleged order to be sealed and extracted.

[46] In *Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors* [2002] 6 MLJ 619; [2002] 4 CLJ 694 Ramly Ali J (later FCJ) held:

> *It is now well settled that an order pronounced by a court can always be withdrawn*, altered, or modified by the same court *until it is drawn up, passed and perfected*. It is also well settled that when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected; such control however, must be used in accordance with judicial discretion. The principle relating to the power of a court to recall an unperfected order has been laid down by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185. This principle was followed by our Federal Court in the case of *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265. It was also followed by our High Court in *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417; [2002] 6 MLJ 619 *at 627* and *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2)* [1998] 6 MLJ 492.
>
> *This power is exercisable whether it is an order made in open court or in chambers, or*

A *whether the order is by consent or otherwise, so long the order has not been perfected, ie drawn up, passed and entered* (see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch D 273). (Emphasis added.)

B **[47]** It becomes apparent that if the expression of thought by the learned SAR made on 25 March 2021 had crystallised into a decision as alleged by the defendant, the same is a nullity. And, the renowned jurist the late Aboolcader J (later FCJ) speaking for the Federal Court in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37 at pp 39–40 said:

C The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering*

D *Ltd* [1967] 2 QB 729, at p 736, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

E *Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void'* (*Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868 880; 116 ER 329 at p 880 (per Denman CJ)). In *Barnard v National Dock Labour*

F *Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p 34 per Singleton LJ). *Ridge v Baldwin* [1964] AC 40 is to the same effect. (Emphasis added.)

G **[48]** Guided by the authorities cited above, I directed that the alleged order of 25 March 2021 said to have been made by the learned SAR is not to be formally perfected pending the disposal of the appeal by the defendant to the Court of Appeal. To my mind, there will be no prejudice to the defendant given the decision I had made on 6 September 2021 the effect of which is to set aside

H the alleged order of 25 March 2021, if one was indeed made by the learned SAR for the reasons I have set out above.

CONCLUSION

I **[49]** In the upshot, I decided that the learned SAR does not have the power to make any order that would have the effect of disposing with finality an appeal from the subordinate court to the High Court which is to be determined by a judge in person and not a registrar. Consequentially, I had decided that the learned SAR could not have made the alleged order of 25 March 2021 and even

if she had done so, the same is a nullity and of no legal effect and for good order is set aside or deemed to be set aside. By agreement of parties, the costs for this set of proceeding is to be in the cause of the appeal.

Order of SAR set aside.

Reported by Dzulqarnain Ab Fatar